

## COMMENCEMENT OF AN ACTION WITHIN THE STATUTE OF LIMITATIONS

*Robinson v. Commercial Motor Freight, Inc.*  
174 Ohio St. 498, 190 N.E.2d 441 (1963)

Plaintiff was injured in an automobile accident on January 20, 1959, as a result of the alleged negligence of one of defendant's employees. Plaintiff filed his petition with the clerk of the Court of Common Pleas of Hancock County, together with a praecipe for service of summons, on Friday, January 20, 1961. The clerk failed to issue the summons to the sheriff until Monday, January 23, 1961, and defendant was served on Wednesday, January 25, 1961. Defendant demurred to the petition on the ground that the action was not brought within the two-year Ohio statute of limitations for bodily injury actions.<sup>1</sup> At the hearing on the demurrer, counsel for defendant asked that the demurrer be treated as a motion to dismiss. The demurrer was so treated and the motion to dismiss was sustained by the trial court. The court of appeals affirmed the dismissal of the action. The Ohio Supreme Court reversed, holding that the action was commenced within the statute of limitations.<sup>2</sup>

A statute of limitations provision sets up a period of time within which a plaintiff may bring his action. In analyzing a statute of limitations problem, one must know when this period begins and when it ends. According to the typical provision, the statute begins to run when the cause of action accrues, and it ceases to run when the action is brought or commenced. Hence, in order to decide whether a plaintiff has brought his action properly within the statutory period, one must know what has to be done to effectively commence an action, and this was the problem before the court in the instant case.

With this holding, the Ohio Supreme Court modified the long established rule as to when an action is commenced for purposes of the statute of limitations. It had previously held that the filing of a petition and a praecipe alone are not enough to commence an action within the period of the statute of limitations, that the effective date of commencement is the date on which the summons is issued, and that there can be no "attempt to commence," within the meaning of the second paragraph of Section 2305.17 of the Ohio Revised Code until a valid summons is issued.<sup>3</sup>

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<sup>1</sup> Ohio Rev. Code Ann. § 2305.10 (Page 1953): "An action for bodily injury . . . shall be brought within two years after the cause thereof arose."

<sup>2</sup> *Robinson v. Commercial Motor Freight, Inc.*, 174 Ohio St. 498, 190 N.E.2d 441 (1963).

<sup>3</sup> *Zakrewski v. Lenczycki*, 50 Ohio App. 116 197 N.E. 595, *aff'd*, 129 Ohio St. 462, 195 N.E. 867 (1935); *McLarren v. Myers*, 87 Ohio St. 88, 100 N.E. 121 (1912); *Baltimore & Ohio R.R. v. Ambach*, 55 Ohio St. 553, 45 N.E. 719 (1896); *Robinson v. Orr*, 16 Ohio St. 284 (1865).

As Judge Zimmerman points out in his dissent, this had been the Ohio law for one hundred years.<sup>4</sup>

The majority seemingly ruled as it did because of the clerk's control over the commencement process. The court pointed out that since the clerk had control over the issuance of summons, which established the commencement date, he had too much power (under the old rule) to determine when an action was commenced. A careless or malevolent clerk could delay issuing a summons and thereby deny a plaintiff his rightful cause of action.<sup>5</sup> With an ever increasing burden on the clerk's office, it is often very difficult for the clerk to issue a summons promptly. Furthermore, the court pointed out that if a clerk had a personal feeling against an individual attorney the clerk might vent such feeling by neglecting to issue a summons until after the statute of limitations had run.

In deciding when this action was commenced the court had to consider the Ohio commencement statutes. The Ohio Revised Code contains various sections applicable to commencement of actions. Section 2703.01 of the Revised Code (in the chapter dealing with service of summons) provides that, "A civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." Section 2305.17 of the Revised Code (in the chapter dealing with limitations of actions) provides that:

An action is commenced within the meaning of Sections 2305.03 to 2305.22, inclusive . . . as to each defendant, at the date of the summons which is served on him. . . .

Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days.

Since section 2305.17 refers specifically to sections 2305.03 to 2305.22, inclusive, which are statute of limitations provisions, the Ohio Supreme Court has indicated that its operation is confined to such matters<sup>6</sup> and that it is of primary importance in determining the time of commencement

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<sup>4</sup> Robinson v. Commercial Motor Freight, Inc., *supra* note 2, at 505, 190 N.E.2d at 446.

<sup>5</sup> The court used the case of McLarren v. Myers, *supra* note 3, to show the harshness of the old rule. In that case the statute of limitations expired on August 23, 1910, and the petition and the praecipe were filed on August 12, 1910. Plaintiff's attorney lived some distance away and hence called the clerk long distance on August 19th to urge the issuance of summons and advise of the approach of the limitation periods. The clerk gave assurance that he would attend to issuance, but on August 23rd he had still not taken any action. Hence, the attorney went to the county seat on the 23rd and told the clerk that the summons must issue that day, as it was the final day of the period of the statute of limitations. The clerk said that he would "attend to it" that day, but he failed to issue the summons until August 27th. Hence, plaintiff's action was dismissed by the court of appeals and the dismissal was affirmed by the Ohio Supreme Court.

<sup>6</sup> Rorick v. Devon Syndicate, Ltd., 307 U.S. 299 (1939); Trasher v. Kelly, 73 Ohio App. 304, 55 N.E.2d 873 (1943).

for the purpose of the statute of limitations.<sup>7</sup> On the other hand, section 2703.01 is a general commencement statute. When there is no specific statute laying down a rule as to when an action is commenced for a particular purpose, section 2703.01 may be used to determine the time of commencement. It is thus used in attachment and garnishment cases.<sup>8</sup>

Although, as indicated above, section 2305.17 has been regarded as of primary importance in determining when an action is commenced for the purpose of the statute of limitations, the court in the instant case also placed considerable emphasis on section 2703.01. The court stated that section 2703.01 requires two affirmative acts on the part of plaintiff: (1) the filing of a petition, and (2) the doing of an act (*i.e.*, filing a praecipe) causing a summons to be issued thereon. The court emphasized that plaintiff had done everything within his power to comply with section 2703.01, stating that, "The plaintiff at bar complied with the statute controlling the commencement of an action as to him."<sup>9</sup> However, it would be dangerous and unjustified to assume that the court meant to say that this alone would have been sufficient to constitute commencement of the action for the purpose of the statute of limitations. The court went on in the next sentence to note the important fact that, "The summons was served as provided by law."<sup>10</sup>

The court's emphasis on section 2703.01 may tend to obscure the importance of section 2305.17 in this area, as analysis of that section is complicated by its peculiar syntax. Prior to the enactment of the Revised Code in 1953, the two paragraphs of the present section constituted two separate sections of the Ohio General Code (section 11230 and section 11231). The fusion of the two General Code sections into one Revised Code section tends to blur the distinction between the concepts involved.

The first paragraph of the present section states in part that, "An action is commenced . . . at the date of the summons which is served. . . ." The reference to service is confusing, but it seems reasonably clear that under this language the commencement of an action is not postponed to the

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<sup>7</sup> *Crandall v. Irwin*, 139 Ohio St. 463, 40 N.E.2d 933 (1942).

<sup>8</sup> *Consumers Plumbing & Heating Supply Co. v. Chicago Pottery Co.*, 155 Ohio St. 373, 98 N.E.2d 823 (1951). Ohio Rev. Code Ann. § 2715.01 (Page Supp. 1963) provides: "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant" upon various enumerated grounds. There is a problem here as there is in the statute of limitations area as to when is the action "commenced." The Ohio courts have used § 2703.01 to determine commencement for attachment purposes. See *Rorick v. Devon Syndicate, Ltd.*, *supra* note 6. The courts have held that the action is commenced under § 2703.01 when the petition is filed and the summons issued. In the *Rorick* case it was held that an order of attachment issued prior to the filing of a petition and issuance of summons is void, but an order of attachment issued after the filing of the petition and issuance of summons is valid even though obtained prior to personal service or before commencement of service by publication.

<sup>9</sup> *Robinson v. Commercial Motor Freight, Inc.*, *supra* note 2, at 504, 190 N.E.2d at 444.

<sup>10</sup> *Ibid.*

date of *service* of summons.<sup>11</sup> Thus, even prior to the instant case, if the petition was filed and the summons was actually issued prior to the running of the statute of limitations, but the original summons was served after the running of the statute of limitations, it seems clear that the action was commenced within the meaning of the first paragraph of the section.<sup>12</sup> In such a situation, there is no need to consider the second paragraph of the section.

However, if the summons, although issued prior to the running of the statute of limitations, is not served by the sheriff by return day (usually the second Monday after the date of issuance), it must be returned.<sup>13</sup> An alias summons<sup>14</sup> may then be issued and served within the sixty-day period. In such a situation, it seems impossible to find a timely commencement solely by reference to the first paragraph of the section. Even prior to the instant case, in such a situation, timeliness of commencement could be found by the application of the second paragraph of the section.<sup>15</sup> Thus, when a court states that an action was commenced within the meaning of section 2305.17, it may mean that the action was commenced within the meaning of either one or both paragraphs, the latter being the only interpretation which can be made with assurance in the instant case, due to the general language in the syllabus and opinion.

Under the facts of the instant case, it is arguable that timeliness of the commencement can be established under the first paragraph of the section. If the court had thought it necessary to be more specific, it might have held that the phrase "date of summons" in the first paragraph should not be interpreted literally as the date of actual issuance, but instead should be interpreted to mean the date the summons *should* have been issued, *i.e.*, the date of the filing of the petition and praecipe. Thus interpreted, the first paragraph alone is sufficient to establish timely commencement in the instant case.

An alternative specific interpretation of the instant case is that the filing of the petition and praecipe is an "attempt to commence" within the meaning of the second paragraph of the section.

If a case should arise in which the petition and praecipe are filed just before the expiration of the statute of limitations, the original summons is returned without service, and an alias summons is issued and served within the sixty-day period, it would seem that timeliness could not be established under the first paragraph, and that recourse to the second paragraph would be necessary. It would certainly be consistent with the instant case to hold in such a situation that the filing of the petition and praecipe is an "attempt to commence" within the meaning of the second

<sup>11</sup> *Crandall v. Irwin*, *supra* note 7, at 468, 40 N.E.2d at 935: "Where personal service is obtained, the commencement dates from the date of the summons."

<sup>12</sup> *McLarren v. Myers*, *supra* note 3.

<sup>13</sup> Ohio Rev. Code Ann. § 2703.05 (Page 1953).

<sup>14</sup> Ohio Rev. Code Ann. § 2703.06 (Page 1953).

<sup>15</sup> See Eastman & Kane, "Commencement of a Civil Action in Ohio for Application of the Statute of Limitations," 16 Ohio St. L.J. 140 (1955), for an excellent discussion of commencement procedures in Ohio previous to the *Robinson* case.

paragraph of the section, and that service of the alias summons within the sixty-day period brings the case within the second paragraph, so that the action is properly commenced."

However, if a case should arise in which the petition and praecipe are filed just before the expiration of the statute of limitations, the original summons is returned without service, and there is no service of an alias summons within the sixty-day period, it would seem clear that the action is not commenced in time, even under the more liberal rule established by the instant case. In spite of the emphasis in the instant case on section 2703.01, the court's reference to section 2305.17 makes it clear that the court was holding that the case was within the terms of the latter section,<sup>16</sup> and that a case must be within the terms of the latter section before there can be a timely commencement. Thus, if a plaintiff files a petition and praecipe shortly before the expiration of the statute of limitations, he should not assume that the instant case guarantees that the action has been commenced. Instead, he should make every effort to see that the summons is promptly and properly served on the defendant. If the original summons is served on the defendant, the instant case would undoubtedly insure that the commencement was timely, even if the clerk had failed to issue the summons until after the expiration of the statute of limitations. If the sheriff is unable to serve the original summons, plaintiff should promptly file a praecipe for an alias summons, and should make every effort to see that it is served promptly. If service is not made within the sixty-day period, even though plaintiff has been diligently endeavoring to procure service, there has not been a timely commencement, whether or not the clerk issued the summons prior to the expiration of the statute of limitations. There is nothing in the instant case to suggest a contrary result in such a case.

Furthermore, there is no reason to believe that the court will relax the rule any further. If plaintiff fails to file a petition and praecipe until after the statute of limitations has expired, there clearly has not been a timely commencement.

The holding in the instant case has corrected a long existing flaw in Ohio's civil procedure. Plaintiff's lawyer will no longer have to stand over the clerk of courts to make sure a summons is issued before the running of the statute of limitations. The problem of the careless, malevolent, or merely overworked clerk has been eliminated in this area. However, due to the court's failure to make an explicit analysis of section 2305.17, many questions are still unanswered. The only sure way for an Ohio plaintiff to proceed is to file his petition and praecipe before the statutory period has expired and to make sure that actual service is obtained as soon as possible, and within sixty days at the latest. This will protect against possible future decisions of the court which may require a "diligent endeavor" to procure service after the filing of a petition and a praecipe.

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<sup>16</sup> *Byers v. Dobies*, 93 Ohio L. Abs. 114, 193 N.E.2d 417 (Ohio Ct. App. 1963) is a recent case declaring that the rule established by the *Robinson* case refers to both § 2703.01 and § 2305.17 of the Ohio Revised Code.